



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
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**APPLICATION FOR CERTIFICATION FOR THE
*CHULA VISTA ENERGY UPGRADE PROJECT***

DOCKET No. 07-AFC-4

**ORDER DENYING APPLICANT'S REQUEST FOR A FURTHER POSTPONEMENT OF
FULL COMMISSION CONSIDERATION OF THE PRESIDING MEMBER'S PROPOSED DECISION
AND DENYING APPLICANT'S REQUEST TO SUSPEND THE PROCEEDING**

On January 23, 2009, the Committee reviewing the Application for Certification (AFC) in this matter issued its Presiding Member's Proposed Decision (PMPD). Incorporated in the PMPD was notification to Applicant MMC Chula Vista that the Committee would entertain a request to override land use laws, ordinances, regulations and standards (LORS) to which the project did not conform. At the same time, the Committee issued notice of a Committee Conference to be held on February 23, 2009, in Chula Vista, to receive comment from the parties and the public on the PMPD.

On February 10, 2009, Applicant filed a Request for Extension of Time for the PMPD Public Comment Period and Committee Conference. In that filing, Applicant requested a minimum of two additional weeks, or until at least March 9, 2009, to continue its review of the PMPD and determine its future course of action in this matter. The Committee granted that request, and held the Committee Conference in Chula Vista on April 13, 2009. Shortly thereafter, the Committee issued its Errata, and scheduled full Commission consideration of the PMPD and Errata for the May 20, 2009 Business Meeting. That meeting was later cancelled, and full Commission consideration of the PMPD and Errata was rescheduled for the June 17, 2009 Business Meeting. Notice of that date was sent out on May 6, 2009.

On June 8, 2009 Applicant, through its counsel, made a telephonic request that full Commission consideration of the PMPD and Errata be taken off the June 17 agenda, that this proceeding be suspended, and that Applicant be required to issue a status report in October, 2009. Applicant's counsel made those requests in writing on June 9, 2009. The stated reason for these requests was that Applicant was in the process of finalizing a sale of the project, and that delaying the proceedings would give the new owner an opportunity to further consider its course of action, including possibly asking the Committee to consider an override of the land use LORS that form the basis for the Committee's recommended denial of this AFC.

Intervenor Environmental Health Coalition (EHC) promptly filed a written objection to Applicant's request. EHC argues that the sale transaction has been pending for many months, and that the PMPD has been a matter of public record since it was issued in January. Thus, EHC argues, Applicant's waiting until now to make this request is untimely, will unreasonably inconvenience others who have made plans to attend the June 17 hearing, and will unnecessarily prolong final resolution of this matter. EHC concludes that there is no benefit to Applicant or the buyer to be gained by further delay, and that even if there were some slight benefit, the negative aspects of further delay—including the time and expense involved in extending the duration of EHC's participation in the proceeding--would outweigh it.

On June 11, 2009, MMC filed a brief in reply to EHC's opposition, providing further details about the sale transaction and emphasizing that postponing full Commission consideration of the PMPD and suspending the proceedings would give the new owner additional time to determine its future course of action with respect to this AFC proceeding. A good portion of the reply brief concerns the possibility that the new owner may decide to seek a LORS override.

The Committee finds troubling the statements in the moving papers, and the reply brief, indicating that the new owner of the project may consider seeking an

override or some other course of action. The Committee offered Applicant the opportunity to request an override when the PMPD was issued in January. The Errata was issued on May 4, 2009, making it clear that the Committee's recommendations remained essentially unchanged from those set forth in the PMPD. Applicant has never indicated that it was considering asking the Committee to consider an override. Then, 3 days ago, Applicant filed this motion and stated that the new owner "*will need to decide* whether it will ask the Commission to consider an override" (MMC opening brief at 2)(emphasis added). In essence, MMC asks that this proceeding be further delayed based upon the mere possibility that the new owner might decide to seek an override.

A new owner of this project will not gain any rights in this proceeding that Applicant does not now possess. Were Applicant to come forward this late in the proceedings and ask the Committee to consider an override, Applicant would need to establish to the Committee's satisfaction that it could not have made the request earlier due to circumstances about which it neither knew nor could have known. The new owner will stand in the shoes of the Applicant.

Finally, we address MMC's assertion that since the issue of override will not be before the Commission at the PMPD adoption hearing, the new owner should have an "opportunity to present it" at some future time (MMC Reply Brief at 5). The issue of whether or not the Commission should override the land use LORS pursuant to section 25525 of the Public Resources Code will not be before the Commission at the PMPD adoption hearing because there is no evidence about override in the record. There is no evidence about override in the record because MMC chose not to put on evidence about override despite the Committee's express offer to re-open the record for that purpose.

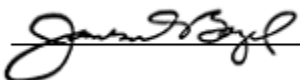
Again, the new owner will not have any rights in this proceeding beyond those possessed by Applicant. The consequences of MMC's failure to address override will inure to the new owner. Commission consideration of adopting the

PMPD and Errata on June 17 will not affect the new owner's rights any more or less than it will affect those of MMC.

Applicant has failed to establish that postponing full Commission consideration of the PMPD and Errata, or suspending the proceeding, would confer any benefit on anyone. EHC, however, has shown that further delay would inconvenience persons interested in this proceeding and would require intervenors to continue to incur the expense of participation.

Furthermore, the Commission's Application for Certification process is intended to take 12 months. Nearly 21 months have elapsed since this AFC was found data adequate and the process commenced. Full Commission consideration of the PMPD is the last step in our process, and we gave notice of our intent to conduct that hearing weeks ago. Applicant has not shown that good cause exists for further delay, and the requests set forth in its motion are therefore **DENIED**. Full Commission consideration of the PMPD and Errata will take place at the June 17, 2009, Business Meeting. The parties at that time will have the opportunity to argue their positions with respect to the PMPD to the full Commission.

Dated: June 11, 2009, at Sacramento, California.

A handwritten signature in black ink, appearing to read "James D. Boyd", written over a horizontal line.

JAMES D. BOYD
Vice Chair and Presiding Member
Chula Vista Energy Upgrade Project AFC Committee